Hari Shankar Lal

Vs

Shambhunath Prasad and Others

Civil Appeal No. 219 of 1958

(CJI B. P. Sinha, K. Subha Rao, Raghuvar Dayal, J. R. Mudholkar JJ)

04.05.1961

JUDGMENT

SUBBA RAO, J. -

This appeal by certificate raises a question of construction of r. 3 of the First Schedule to the Arbitration Act, 1940 (10 of 1940) (hereinafter referred to as the Act).

The facts material to the question raised may be briefly stated. The appellant and respondents 1 and 2 are brothers. On August 17, 1948, the appellant and respondents 1 and 2 and their mother by a registered deed of agreement referred their dispute regarding the partition of two houses in the city of Banaras to two arbitrators, respondents 3 and 4. Within 10 days of the reference, the said arbitrators gave notice to the parties and began to take evidence i.e., they entered on the reference. On July 25, 1949, Rajwanti, the mother of the appellant and respondents 1 and 2 died, and the arbitrators did not proceed with the inquiry. On August 31, 1950, i.e., more than one year after the death of Rajwanti, the appellant gave a notice to the arbitrators requesting them to proceed with the reference and give the award at an early date. On October 1, 1950, i.e., within 4 months from the date of the notice, the arbitrators made an award and it was duly registered. On January 23, 1951, the appellant filed an application under ss. 14(2) and 17 of the Act in the Court of the Civil Judge, Banaras, praying that the said award be filed and be made a rule of the court. The said application was registered as a suit; the appellant was placed in the position of plaintiff and the respondents in that of defendants. The respondents raised various objections to the said application; one of the objections, with which only we are now concerned, was that the award was not given within the time fixed by law. The learned Civil Judge rejected the objections and made a decree in terms of the award. On appeal, the High Court came to the conclusion that the award was made after the expiry of the period of limitation, and on that finding set aside the decree of the learned Civil Judge and dismissed the suit with costs. Hence this appeal.

Learned counsel for the appellant contends that r. 3 of the First Schedule to the Act provides for alternative periods within which arbitrators have to make their award, that under the second alternative an award could be made within 4 months from the date of notice issued by a party calling upon the arbitrators to act, and that, as in the present case the notice to act was given by the appellant to the arbitrators on August 31, 1950, the award made by them on October 3, 1950, was within the time prescribed.

The answer to the question raised turns upon the true meaning of the provisions of r. 3 of the First Schedule to the Act. It will be convenient at the outset to read the relevant provisions of the Act.

Section 3 of the Act reads :

> "An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in First Schedule in so far as they are applicable to the reference."

Rule 3 of the First Schedule to the Act is as follows :

> "The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

Section 28 says :

> "(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award."

Section 3 of the Act makes the period prescribed in the First Schedule for making an award a term of the arbitration agreement. Rule 3 of the First Schedule to the Act is couched in a mandatory form and it imposes a duty on the arbitrators to make their award within one or other of the three alternative periods mentioned therein. The first construction suggested by learned counsel for respondents is that the words "entering on the reference" in the first clause of the rule and the words "to act" in the second clause thereof are synonymous and they mean the same thing. This would make the second alternative unnecessary in many cases, for if the words "to act" means "to enter on the reference" there is no need for fixing two separate periods; for, on that construction, notice would always precede the act of entering on the reference and, therefore, the first alternative would serve the purpose. On that construction, the only purpose it serves is that a party may force the pace by calling upon the arbitrators, who are delaying to enter on the reference, to act expeditiously. If the Legislature intended to give such a limited scope to the said rule, it would not have used two different sets of words in the two alternative clauses and different starting points for computing the period of four months. The word "act" is certainly more comprehensive than the words "enter on the reference." The distinction between the said two sets of words has been brought out with clarity in Baring-Gould v. Sharpington Combined Pick and Shovel Syndicate [(1899) 2 Ch. D. 80.]. There, on January 11, 1898, one of the parties served on the arbitrators a notice in writing addressed to both the arbitrators requiring them to appoint an umpire; on February 15, 1898, the arbitrators appointed an umpire; the arbitrators did not make any award but on April 30, 1898, the umpire made his award; it was contended that by the notice requiring the arbitrators to appoint an umpire, they had not been "called on to act" within the meaning of Schedule I(c), to the Arbitration Act, 1889, and consequently the three months within which the arbitrators were required by that clause to make their award had not expired, an the jurisdiction of the umpire had not arisen and his award was invalid. In that context it became necessary to decide what the words "called on to act" mean and whether they were synonymous with the words "called on to enter on the reference." Lindley, M.R., adverting to that contention observed at p. 91 :

> "The three months are to run first "after entering on the reference"; and then in the alternative, after "having been called on to act" ..... If they are 'called on to act' as arbitrators, it must mean that they are called on to do an act as arbitrators. It appears to me that these arbitrators were 'called on to act' by the notice to appoint an umpire;

> and there was very good reason for making the period of three months run from that time. If the arbitrators do not 'enter on the reference', and they are 'called on to act', it is an intimation to them that they are called on to do the work. I can not agree with Stirling J. that 'called on to act' means 'called upon to enter on the reference'. Being called on to do anything as an arbitrator is being called on to act. That the appointing of an umpire is an act done by the arbitrators as arbitrators is obvious. To do that which they could only do in the character of arbitrators is, in my judgment, clearly within the words, and I think it is within the sense of the expression used in clause (c)."

No doubt in the above case, unlike in the present case, the arbitrators were called on to act before they entered on the reference; but that cannot make any difference in the application of the principle, namely that "to act" is not the same as "to enter on the reference", and that the former is of a wider import than the latter. The Allahabad High Court, in Sardar Mal Hardat Rai v. Sheo Bakhsh Rai Sri Narain [(1922) I.L.R. 44 All. 432.], had to consider the scope of r. 3 of the First Schedule to the Act in a different context. There, on January 14, 1919, a dispute had been referred to arbitrators; the award was made on August 23, 1919; it was contended that the award had not been made within three months after the arbitrators entered on the reference, nor was it made within three months after having been called upon to act by notice in writing by one of the parties to the submission. Piggott and Walsh, JJ., held that the two clauses were alternative in the sense that when no reference was entered upon at all then the time ran from the notice calling upon the arbitrators to act, and that if they had entered on the reference, they had three months from that moment for making their award. In that case, the notice to act was given before the arbitrators entered upon the reference, and as the award was made within the prescribed time from the date of entering upon the reference, though beyond the prescribed time from the notice asking the arbitrators to act, they held that the award was within time on the basis of the second alternative. In neither of the two cases the question that now falls to be considered had directly arisen, namely, whether, if the notice to act was given subsequent to the arbitrators entering on the reference, the period should be computed from the former date or from the latter date. That question arises in this case.

The said discussion leads us to the conclusion that though entering on the reference is an act of the arbitrators, that is not exhaustive of the content of the word "act" in the second alternative.

But this wide construction, without limitation would defeat the purpose of r. 3. The object of the rule is to prescribe a time limit in the interest of expeditious disposal of arbitration proceedings. If under the second alternative notice to act can be given at any time, it would enable one of the parties to enlarge the period of time prescribed indefinitely : not only the time limit prescribed would become meaningless but one of the parties could also, without the consent of the other, resuscitate a dead or stale reference. This could not have been the intention of the Legislature and, therefore, a reasonable construction should be placed upon the provision. Such a limitation on the right of a party to reopen an abandoned reference is implicit in the words "to act". A party can ask the arbitrator to act if he is legally bound to act under the reference. If after the expiry of four months from the date of entering on the reference an arbitrator can no longer act, a notice given thereafter cannot ask him to act. Realizing this difficulty, learned counsel for the respondents suggests that an arbitrator can act even after four months, though the award cannot be filed without getting an extension of time from the court. But the relevant provisions do not support this contention.

The third alternative in r. 3 shows that an award can be made within the extended time allowed by the Court. Section 28 of the Act enables the court to extend the time for the making of the award;

extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though, when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est. In this view, the second alternative in r. 3 can be invoked only in a case where a notice to act has been given to the arbitrators either before the arbitrators entered on the reference or after they have entered on the reference but before the period of four months from that date has run out.

It is said that this construction also may start off a chain of notices which may lead to the same result sought to be avoided by it. The argument is that if one of the parties gives a notice to act, it gives the arbitrators 4 months from that date to act and if before the expiry of the 4 months from that date of notice another notice is given, they will get another lease of life and so on indefinitely. Though there is some plausibility in the criticism, it is answered by our confining the right to give notice by a party to the period of four months from the date the arbitrators entered upon the reference. Nor the apprehension that a party may go on giving number of notices to act within the said 4 months from the date of the arbitrators entering upon the reference, each notice giving a fresh period of 4 months, has any basis. A notice to act can only be given when an arbitrator is not acting i.e., he has refused or neglected to discharge his duty. Therefore, every notice cannot give a fresh period unless in fact the arbitrators refused or neglected to act before such notice is given. The legal position may be formulated thus : (a) a notice to act may be given before or after the arbitrators entered upon the reference, (b) if notice to act is given before they entered upon the reference, the four months would be computed from the date they entered upon the reference, (c) if a party gives notice to act within 4 months after the arbitrators entered upon the reference, the arbitrators can make an award within 4 months from the date of such notice, and (d) in that event, after the expiry of the said 4 months the arbitrators become functus officio, unless the period is extended by court under s. 28 of the act; such period may also be extended by the court, though the award has been factually made.

In the present case, the notice was given long after the expiry of four months from the date when the arbitrators entered on the reference and, therefore, they could no longer act pursuant to the notice calling upon them to act. The proper course should have been to apply to the court for extension of time under s. 28 of the Act. We, therefore, agree with the conclusion arrived at by the High Court, though on different grounds.

In the result, the appeal fails and is dismissed with costs.

RAGHUBAR DAYAL, J.

I agree with the order proposed, but for different reasons, which I now state.

The period of four months under r. 3 of the First Schedule to the Arbitration Act is to run from the date of the arbitrators entering on the reference or from the date on which they have been called upon to act by notice in writing from any party to the arbitration agreement. If the arbitrators have entered upon the reference, the period of four months begins to run from the date they entered on the reference. Any notice subsequently given to them calling upon them to act will not make the period of four months start afresh from the date of the service of the notice. Such a notice would be ineffective for the purposes of determining the period of four months within which the arbitrators had to make the award. In fact, there would be no valid occasion for giving such a notice subsequent to the arbitrators entering on the reference. Parties cannot prompt them for conducting their enquiry

or taking steps in connection with the enquiry. Even if they do, in case the arbitrators were lethargic, such a notice is not contemplated by r. 3 of the First Schedule.

A case may possibly arise when an arbitrator, by his conduct, indicates that he refuses to act and that it becomes necessary for a party to give notice to the other arbitrator to appoint another person arbitrator in his place. The appointment of arbitrators, would be complete after the fresh arbitrator has been appointed. The proceedings taken previously would have come to an end as infructuous. The period of four months, therefore, would start in accordance with the provisions of r. 3 of the First Schedule and not from the date on which any party had called upon the remaining arbitrators to appoint an arbitrator in the place of one who had refused to act. Sections 8 and 9 of the Arbitration Act provide for the appointment of an arbitrator by the Court in place of such defaulting arbitrator.

The view that the fresh period of limitation will begin to start from the date of the notice if it be served within the period of four months which had begun to run from the date on which the arbitrators entered on the reference, would mean that any of the parties will be able to extend the period by just giving a notice, to the arbitrators within the original period of four months. Such an effect of a unilateral notice could not have been intended by the Legislature. If one can extend the time - the original period of four months - by giving a notice within that period, there is no reason why another fresh period of four months should not start by the giving of a second notice to the arbitrators to act, before the expiry of the period extended by the first notice. If this be possible, the period for making the award can be extended without any limit by any of the parties. This is what must have been in the mind of Lindley, M.R., in Baring Gould's Case [(1899) 2 Ch. D. 80, 91.] when he said :

> "The arbitrators have three months within which to make their award, and the umpire has another month after the expiration of those three months. Every one agrees, although the enactment does not expressly say so, that the time from which the three months are to be reckoned is the first of the two periods mentioned, and not the last. If it were the last, the proceedings might be very unreasonably postponed."

The enactment under consideration there, is to be found quoted at the bottom of page 86 and, but for the period of three months instead of four months, is in identical terms with those of r. 3 of the First Schedule.

In the present case, the arbitrators did enter on the reference by the end of August, 1948, and therefore the award made on October 3, 1950 was made beyond the period of four months of the arbitrators' entering on the reference, and was therefore made when the arbitrators had no jurisdiction to make it.

In this view, it is not necessary to consider whether the notice to act, served after the period of four months had expired, is a good notice or not, or whether the arbitrators are competent to act in expectation of getting the time extended by the Court or not. I am, however, inclined to the view that in view of the provisions of s. 28, it is not possible to say that the arbitrators are not competent to act after the expiry of the period of four months from the date of their entering on the reference. The provisions of this section contemplate the arbitrators having made the award beyond the period of limitation without having previously obtained the order of the Court extending the time of making the award. This implies that the arbitrators would have carried on their proceedings and would have made the award subsequent to the expiry of the period during which they should have

made the award. The competency of the arbitrators to act in pursuance of the reference arises out of the reference made by the parties and is not dependent on the period during which they ought to make the award. So long as the power vested in them to decide the dispute between the parties is not withdrawn, they continue to be competent to act on the reference in expectation that the period for making the award would be extended by the Court.

I also do not consider it necessary to decide in this case as to when arbitrators can be said to enter on the reference or what is meant by 'their being called upon to act' by notice under r. 3 of the First Schedule. I simply not that I agree with the view expressed in Iossifoglu v. Coumantaros [(1941) 1 K.B. 396.] that arbitrators enter upon a reference as soon as they have accepted their appointment and have communicated with each other about the reference. This is a stage earlier than their starting the proceedings in the presence of the parties or under some peremptory order compelling them to conclude the hearing ex parte. 'Calling upon the arbitrators to act' does include asking the arbitrators to enter on the reference but may also include asking them to do anything in connection with the reference except asking them to do the routine acts connected with the enquiry.

Appeal dismissed.

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